

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO DESHAWN JENKINS,

Defendant-Appellant.

UNPUBLISHED

March 8, 2005

No. 250912

Wayne Circuit Court

LC No. 03-005659

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN KAREEM WILLIAMS,

Defendant-Appellant.

No. 250913

Wayne Circuit Court

LC No. 03-005659

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

In Docket No. 250912, defendant Jenkins appeals as of right from his convictions by a jury of assault with intent to murder, MCL 750.83, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to thirteen to twenty years' imprisonment for the assault with intent to murder conviction, to a concurrent term of one to four years' imprisonment for the felonious assault conviction, and to a consecutive term of two years' imprisonment for the felony-firearm conviction. In Docket No. 250913, defendant Williams, who was tried jointly with Jenkins, appeals as of right from his convictions by a separate jury of assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm by a felon, MCL 750.224f, and felony-firearm. The trial court sentenced him to 34 to 120 months' imprisonment for the assault conviction, to a concurrent term of one to five years' imprisonment for the felon in possession of a firearm conviction, and to a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm in part and reverse and remand in part in Docket No. 250912. We reverse and remand in Docket No. 250913.

All parties agree, in accordance with an affidavit signed and filed by the court reporter, that the tapes of the testimony portion of the trial have been lost and that a transcript cannot be prepared. Only the jury selection, closing arguments, verdict, and sentence were transcribed. A hearing to settle the record occurred on May 27, 2004, and two separate statements of fact were produced (one for each defendant). The two statements are largely consistent with each other.

The settled statements of facts note that, at the preliminary examination, a witness, Edward Perry, testified as follows: He, Williams, and Jenkins were in Perry's cousin's house during the afternoon of April 25, 2003. An argument and struggle ensued between Perry and Jenkins. Jenkins produced a shotgun and then told Williams to "[g]et 'em." Williams somehow obtained the shotgun. Eventually, Perry began to run out of the house, and Williams said, "Break yourself, dog, break yourself, n____r," while cocking the shotgun. Jenkins told Williams to shoot Perry. Perry ran, heard the firing of the gun, and realized he had been shot.

The settled statements of fact, referring to testimony elicited at the May 27, 2004 hearing, indicate that the court reporter's notes referred to four witnesses who testified at trial: Perry, Officer William Niarhos, Officer Herman King, and Officer DaNeil Mitchell.¹ The reporter's notes indicated that Robert Simmons, Williams' attorney, did not cross-examine these officers. The trial court's notes referred to an additional trial witness: Officer Fred Stahl.

The statements of fact indicate that Simmons testified that he took "limited notes" but that "he recalled that the testimony of complainant Perry was consistent with his [preliminary examination] testimony." However, Simmons did not think that everything elicited from Perry at the preliminary examination was elicited at trial; Simmons believed there was "less testimony" at trial. Thomas Dienek, Jenkins' attorney, testified that he did not take notes during the trial and remembered "very, very little." However, he recounted that Jenkins had testified that he feared Perry, that he attempted to remove the shotgun from the house for safety purposes, and that the shotgun discharged as Perry struggled to get the gun away from Jenkins.

Dienek could not recall whether the testimony of the police officers was consistent with their police reports. Simmons indicated that the officers' testimony was consistent with their preliminary complaint records. The following information was set forth, with minor stylistic differences, in both statements of fact:

The preliminary complaint record of William Niarhos states that he performed a gunshot residue test on Defendant Jenkins at 8:30 p.m. [on] April 25, 2003. It does not report the results of the test. Herman King's report states that the incident occurred at or about 3:10 p.m. and was reported to the police about 20 minutes later. He was dispatched to 1714[7] Westphalia on a report of a person with a weapon. When he arrived, he observed Perry lying on the ground face up. According to King, Perry stated that he had been shot by Defendant

¹ The settled statement of facts for Jenkins' case indicates that the court reporter's notes referred to an "Officer Daniels." However, it is apparent from context that the notes referred to "Officer DaNeil Mitchell."

Jenkins, who lived around the corner. King went to 17146 Fairport, where he observed clothing on the front lawn. The house was empty. There was what appeared to be a shotgun blast to the ceiling, a shotgun casing on the floor and one in the street. He spoke with witnesses Vaelean Jordan, who stated that she witnessed Defendant Jenkins and complainant struggle over a shotgun before she ran from the house and called the police, and Sharon Williams, who stated that from the bathroom she heard two shots – one inside the house and one outside. Daniel [sic, DaNeil] Mitchell was the investigating officer and he obtained a statement from Defendant Jenkins, prepared, secured and assisted in the execution of a warrant to search the Fairport address and administered a photo lineup for Perry as to Defendant Williams. Officer Stahl reported that he responded to a “man shot” dispatch at 17147 Westphalia. There he spoke with Perry, who stated that he had a verbal argument with an unidentified suspect at 17146 Fairport, who shot him in the back with a shotgun as he attempted to run from the suspect. Stahl observed multiple buckshot wounds to Perry’s face, back and arm. EMS conveyed Perry to St. John Hospital.

Defendants argue that they are entitled to new trials because of the unavailable transcript. In examining this issue, “[w]e must determine whether the unavailability of . . . the transcript so impedes the enjoyment of the defendant’s constitutional right to an appeal that a new trial must be ordered.” *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). If “it is impossible to review the regularity of the proceedings due to the lack of transcripts,” then a new trial must be ordered. *People v Horton*, 105 Mich App 329; 306 NW2d 500 (1981).

We conclude that reversal is required with respect to Williams’ appeal. Indeed, Williams’ issue on appeal involves his claim that he received ineffective assistance of counsel. He notes that, according to the settled statement of facts, his attorney did not cross-examine three of the police witnesses. Moreover, Perry testified at the preliminary examination that only one shot occurred on the day in question, that Jenkins told Williams to shoot Perry, and that Williams had possession of the shotgun right before the shooting. Despite this testimony, Officer Niarhos submitted a report indicating that Jenkins admitted to firing a shotgun “once,” and another police report stated that Perry reported having been shot by “Antonio” (Jenkins) as opposed to Williams. Additionally, the prosecutor stating in closing arguments before Williams’ jury that “Perry was resistant in saying that Mr. Williams did something.” When asked about this statement at a later hearing, the prosecutor stated, “I was trying to compare what Mr. Jenkins and Mr. Williams were doing in that [Perry] was more upset with Mr. Jenkins than he was with Mr. Williams, to the best of my recall.”

In light of the inability of Simmons to recall many details of the trial, the evidence of a lack of cross-examination of witnesses, and the suggestion of the existence of exculpatory evidence with regard to Williams that might not have been fully explored by defense counsel, it is simply impossible for us to determine, without benefit of the missing trial transcript, whether Williams received adequate assistance from his trial counsel. “[I]t is impossible to review the

regularity of the proceedings due to the lack of transcripts,” and a new trial therefore must be granted with regard to Williams’ convictions. *Horton, supra* at 306.²

We also reverse and remand for a new trial with regard to one of Jenkins’ convictions. Indeed, Jenkins argues on appeal that the evidence was insufficient to support his conviction for assault with intent to commit murder because, “[a]ssuming that [Jenkins] told Williams to shoot Perry, the evidence at best proved that [Jenkins] wanted Williams to scare Perry.” While the evidence at the preliminary examination arguably was sufficient to support Jenkins’ conviction, the settled statement of facts simply does not provide us with enough information to review the instant issue. Indeed, while the statement of facts mentions that Simmons testified that he “did not recall any inconsistencies between the preliminary examination and trial testimony of the complainant,” the statement also indicates that Simmons “had no independent recollection of the proceedings.” Moreover, the statement of facts indicates that Deinek had “very very little independent recollection of the proceeding[s].” The statement of facts also mentions Jenkins’ own exculpatory testimony. From the basis of the existing record we simply cannot conclude, with certainty, whether Jenkins’ conviction was indeed supported by sufficient evidence. Once again, “it is impossible to review the regularity of the proceedings due to the lack of transcripts,” and a new trial must be granted. *Id.*

Jenkins’ remaining two convictions, however, must stand. Indeed, as noted in *Audison, supra* at 834-835:

We must determine whether the unavailability of . . . the transcript so impedes the enjoyment of the defendant’s constitutional right to an appeal that a new trial must be ordered. If the surviving record is sufficient to allow evaluation of defendant’s claims on appeal, defendant’s right is satisfied; the sufficiency of the record depends upon the questions which must be asked of it. [Internal citations and quotation omitted.]

The only issue Jenkins raises on appeal, aside from his generic argument that the missing transcript requires that a new trial be ordered, is that his assault with intent to commit murder conviction was not supported by sufficient evidence. He does not challenge his remaining two convictions on grounds aside from the missing-transcript argument. As noted, “the sufficiency of the record depends upon the questions which must be asked of it.” *Id.* Because Jenkins does not challenge the remaining two convictions, they must stand.³

² Given our conclusion, we need not reach Williams’ argument concerning the sufficiency and weight of the evidence against him.

³ By contrast, Williams’ ineffective assistance of counsel argument pertains to all his convictions.

Docket No. 250912 is affirmed in part and reversed and remanded in part. Docket No. 250913 is reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello